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No. 90-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

MARK OWEN McGUIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit exceeded its habeas corpus jurisdiction by finding a federal due process violation arising from a state trial court evidentiary ruling which the state appellate court found to be correct as a matter of state law.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 902 F.2d 749 (1990). A copy appears in the Joint Appendix at J.A. 98-114. The order denying rehearing and rehearing en banc, and the dissent from denial of en banc consideration is reported at 919 F.2d 578 (1990). It appears in the Joint Appendix at J.A. 115-134. The unreported order of the

District Court denying the petition for writ of habeas corpus appears in the Joint Appendix at J.A. 55-71. The unpublished opinion of the California Court of Appeal, First Appellate District, appears in the Joint Appendix at J.A. 42-53.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 4, 1990. Rehearing was denied on November 23, 1990. A petition for writ of certiorari was timely filed on December 17, 1990. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. On February 25, 1991, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part: "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT

A. Procedural History

By information filed in Alameda County Superior Court on September 30, 1981, respondent Mark Owen McGuire was charged with one count of murder, in violation of California Penal Code section 187. On March 19, 1982, a jury convicted respondent of second degree murder. He was sentenced on May 12, 1982, to state prison for the statutory term of fifteen years to life.

On January 15, 1985, the California Court of Appeal for the First Appellate District affirmed the judgment of conviction. J.A. 42-53. The California Supreme Court denied respondent's petition for hearing on March 21, 1985. J.A. 54.

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California on August 30, 1985.[1/] The petition was denied in an unpublished order on July 15, 1987. J.A. 55-71.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On May 8, 1989, the court issued an opinion reversing the District Court and ordering the State of California to retry respondent. 873 F.2d 1323; J.A. 72-82. That opinion was vacated on

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1. An earlier petition was denied without prejudice on April 24, 1985, because respondent had not alleged that state remedies were exhausted.

April 23, 1990, J.A. 97, and a second opinion was filed on May 4, 1990. 902 F.2d 749; J.A. 98-114. The court again reversed respondent's conviction. Rehearing and rehearing en banc were denied on November 23, 1990, with two circuit judges dissenting from the denial of en banc review. 919 F.2d 578; J.A. 115-134.

B. Factual Background

About 9:00 p.m. on July 7, 1981, respondent and his wife, Daisy, brought their six-month old baby, Tori Aurora McGuire, to the emergency room of the Kaiser Hospital in Hayward. RT 186-187. Tori was bluish in color and not breathing. Nurse Susan Massaglia immediately grabbed the child and ran with her to the emergency treatment room. RT 188-189. The nurse later observed bruises on Tori's body. RT 188-189.

Ms. Massaglia returned to the screening area and asked the parents for a medical history. Respondent said that Tori had a cold recently. He also claimed that she had fallen off of the couch and hit her head sometime that morning. RT 191-192. Respondent did not mention any trauma or other event which could have injured Tori's ribs or her rectum. RT 192-193.

Dr. Sharon Levine examined Tori two or three minutes after the child arrived in the treatment room. Tori was in cardiac arrest, had no vital signs or independent pulse, her skin was cool, and her pupils were

restricted and fixed. RT 80, 82, 85-86. Tori had a large, "relatively recent" bruise on her upper left chest, with multiple bruises around it. RT 81, 86. Dr. Levine also observed black and blue marks on the baby's ears and scar tissue indicative of a tearing wound to the rectum. RT 83-85. Despite the best efforts to save her, Tori was pronounced dead at 9:45 p.m. RT 81, 87.

An autopsy was performed by Dr. Paul Hermann on July 8. He observed at least seventeen separate contusions on the baby's chest, and twenty-nine more on her abdomen. RT 124-125. The bruises were "quite fresh"[2/] and suggestive of a blow from a hand or fist. RT 129, 145.

Tori sustained extensive internal injuries. Her liver was split in two; her pancreas was lacerated and also torn in half; the lower right lung and large vein from the heart to lower body were damaged; and part of the large intestine was lacerated. RT 125-129. The destruction of the pancreas was an "extremely painful" injury. RT 90. If she was not unconscious, Tori would have been in "considerable pain." RT 140.

All of the injuries appeared to have been inflicted by the same blows which caused Tori's bruises. RT 141. The doctors agreed that it would require a great deal of force to cause such extensive internal damage.

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2. Dr. Hermann concluded that one bruise on the child's flank was probably several days older than the others. RT 146-147.

RT 91, 130. Dr. Hermann could posit no source other than the application of blunt force to explain Tori's injuries. RT 141. Given the combination of liver and pancreas damage, it was "most likely" that Tori died within minutes, not hours, after the blows were delivered. RT 140, 156-157. Nothing suggested that Tori's injuries occurred hours before her death. RT 169.

Dr. Hermann also discovered evidence of rectal tearing. The injury was at least six weeks old and unlikely to have resulted from constipation, although Dr. Hermann could not rule that out. RT 136-138. Dr. Levine did not think that the rectal injury was caused by constipation or fecal impactment. In her opinion, it resulted from the forceful insertion of a finger or foreign object into the rectum. RT 85.

An x-ray examination of the baby disclosed several partially healed rib fractures which were several weeks to two months old. RT 106-107. Such injuries in a child Tori's age are so "uncommon" as to be "unique." RT 107. The breaks were toward the front of the rib cage which is also unusual, even in adults. RT 110.

Dr. Levine and Dr. Hermann each concluded that Tori was a victim of battered child syndrome, RT 89, 92, 102-103, 139, described by Dr. Hermann as a "group of findings which when combined indicate that child had died as a result of mistreatment from another person, usually an adult." RT 120. An explanation for the child's condition which will not medically justify the injuries

sustained or their severity supports a diagnosis of battered child syndrome. RT 79-80. The doctors agreed that falling from a couch, striking a plastic walker, and landing on the floor could not have caused Tori's injuries. RT 89, 130-131, 141. A fall from sixteen feet, much less sixteen inches, would not explain the severity of Tori's internal damage. RT 141. Although bruises and broken bones can occur by accident, Dr. Levine had never seen a child with the number and severity of injuries suffered by Tori who had not been battered. RT 102-103.

As the doctors struggled to save their daughter, Daisy McGuire sat down next to Margaret Jurich, who was waiting to see a doctor. Mrs. McGuire was "very stoney faced" and Mrs. Jurich made no effort to talk to her. RT 175-177. Respondent walked around near the screening desk for a few minutes, then sat down between his wife and Mrs. Jurich. RT 177.

Mrs. McGuire asked respondent what "really happened." Respondent told her that he was upstairs and "guessed the baby fell off the couch." She continued to ask what "really" happened and respondent's answer was "always the same, I told you what really happened." At one point Mrs. McGuire said, "I am very patient. I can wait a long time. I want to know what really happened." RT 178. She also reminded respondent that Tori "was all right" when Mrs. McGuire left the house and insisted that he was "responsible" for the child's condition. RT 179. Respondent did not answer her. RT 179.

Hayward Police Officer David Lapic went to the hospital in response to a call about a child with unexplained injuries. RT 206. Respondent told him that he had put Tori on the couch and gone upstairs. He heard crying and found her on the floor. Respondent thought Tori "must have fallen and struck the walker." RT 209.

Lapic later went with the McGuires to their apartment. He had seen Tori's bruises before leaving the hospital and commented to respondent that he did not think they were consistent with a fall from the couch. RT 210, 252.[3] Respondent then suggested that "maybe some Mexicans came in" while he was upstairs, but conceded that nothing was missing or disturbed in the apartment. RT 210, 251. He also told Lapic that he was alone with the baby. RT 210.

Respondent was interviewed the next day by Hayward Detective Robert Gillis. He agreed to speak after being advised of and waiving his rights. RT 302-305.[4] Respondent admitted that only he and his wife had custody of Tori on the day she died. The baby was sick but did not have any trouble breathing. Respondent came

3. It was sixteen inches from the cushions of the couch to the carpeted floor. RT 202-203.

4. The jury heard an edited tape recording of the statement. RT 305. A copy of the transcript was included with respondent's traverse in the District Court and in the Excerpt of Record at the Court of Appeals.

home that night around 7:00 p.m. The couple ate dinner and talked, then Mrs. McGuire went out just before 9:00 to make a telephone call; she was gone for five to ten minutes. Tori was on the couch and looked like she was sleeping, so respondent went upstairs to use the bathroom. He heard the baby "crying out real loud" and found Tori "kind of wiggling around" on the floor. Respondent took her upstairs and put her in her crib; he insisted that Tori was "okay." When Mrs. McGuire came home she noticed that Tori was pale and having trouble breathing. Respondent thought the child's stomach hurt her, so they took her to Kaiser Hospital.

After being told that Tori was killed by a "severe blow," respondent suggested that she "might" have fallen on the walker. He denied hitting, killing, or playing rough with Tori. Respondent also said that his wife "always treated the baby with motherly kindness."

Daisy McGuire testified as a prosecution witness under a grant of immunity. RT 342, 427-428.[5] She stated that she hit Tori in the stomach before respondent came home on July 7. RT 342, 348, 364. Mrs. McGuire was mad and upset because the baby had been "crying and crying" all day. RT 356, 364. She also claimed to

5. The immunity had been granted during respondent's preliminary hearing. Outside the presence of the jury Mrs. McGuire assured the court that she was willing to testify so long as she still had immunity. RT 325. She did understand, however, that she could be prosecuted for perjury if she lied. RT 326.

have once pulled down on Tori's bowels when the baby was constipated. RT 406. Mrs. McGuire had never made these admissions to the police[6] or prosecutor before she testified, RT 386, and had refused to discuss her earlier statements with the District Attorney unless her own lawyer was present. RT 366-367. She was, however, still living with respondent, RT 331, 438, and had told him what she had done while he was in jail after the preliminary hearing. RT 385-386, 426. Mrs. McGuire also spoke to a defense investigator and discussed her prior statements and testimony at some length with respondent's defense counsel. RT 367, 429-430. She denied that she was afraid of respondent, RT 357, 389, 446; that respondent had ever hit her, RT 391, 443; or that she ever saw respondent hit Tori. RT 444.[7]

Mrs. McGuire's testimony conflicted with her earlier statements to the police. On the evening of July 7, Mrs. McGuire told Detective Gillis that when she bathed

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6. Mrs. McGuire did not tell the police about hitting Tori because she was pregnant and did not want her baby to be born in jail. RT 386-387. Her second child was born in November 1981 and had been taken away because of this case. RT 437. Mrs. McGuire never told her attorney in the custody proceeding that she had hit Tori because she considered that information to be "confidential." RT 431.

7. Mrs. McGuire insisted that friends whom she visited shortly before Tori's death misunderstood her request for information about a battered women's shelter. RT 358. She also denied telling her friends that respondent had attempted to toilet train their five-month-old daughter. RT 418-419.

Tori she sometimes noticed bruises on the baby's side. She did not know how they got there, adding that she was not the only person who cared for the child. Mrs. McGuire acknowledged that respondent also took care of Tori. She had asked respondent about the bruises, but he did not know how Tori got them. When Gillis asked whether respondent would hurt the baby, Mrs. McGuire replied, "I can't say . . . ." RT 371. She also stated that Tori was alive and "okay" when Mrs. McGuire left to make the telephone call. RT 372, 374.

On July 8, Mrs. McGuire again stated that Tori was breathing and uninjured when she left to make the telephone call. RT 379. When told that the baby had been killed by a blow to the chest, Mrs. McGuire denied hitting Tori. She did not know whether respondent killed Tori stating, "I can't, I really can't say anything, because I did not see what happened." She did, however, reiterate that she and respondent were the only people to have custody of Tori that day. RT 410-411.

Respondent told Mrs. McGuire that Tori had fallen from the couch. RT 412. At the hospital she asked him about this explanation because she was mad and it was "not so clear" to her what he meant. Mrs. McGuire wanted an explanation from respondent. RT 408. Later she testified that she wanted to know what had happened because she hoped that she was not responsible for Tori's injuries. RT 450-451.

Mrs. McGuire's testimony was also internally inconsistent. At one point she said that she hit Tori a "couple" of times. RT 422. On other occasions she was not sure how many blows she struck. RT 364, 461. Mrs. McGuire stated that Tori stopped crying after she was hit, RT 413; a few moments later she claimed the infant was still crying. RT 422.

Diane Short lived in the same apartment complex as the McGuires. RT 462. Early one morning she heard noises outside and saw respondent holding his wife against the wall with his knee in her stomach and choking her as she tried to pull away. RT 463.

On Memorial Day, Mrs. Short spoke to Mrs. McGuire, who seemed nervous and upset. She told Mrs. Short that respondent had hit her across the face. RT 466-468. Later that day Mrs. Short saw respondent feeding Tori. He roughly pinched the baby's cheeks and forced the food into her mouth. His action left marks on Tori's face. RT 469-470. Mrs. McGuire said she was afraid to leave Tori with respondent because he "pinched her cheeks and did bad things." RT 470. That afternoon Mrs. Short noticed bruises on Tori's thighs, buttocks, and face. RT 470-471. The marks on her face were in the locations respondent had grabbed Tori while he was feeding her. RT 475-476. On another occasion Mrs. Short saw petitioner pick Tori up by one arm and carry her to the car. RT 488-489.

From June 28 to July 2, 1981, Mrs. McGuire and Tori stayed with the Linders on Treasure Island. Mr. Linder knew respondent from the Navy. RT 491, 494-495. Mrs. McGuire complained that respondent was trying to teach Tori to swim and use the toilet at too young an age. She also stated that respondent would not allow Tori to cry. RT 496-499. Mrs. McGuire asked for information on a battered women's shelter and expressed concern about respondent obtaining custody of the child in a divorce. RT 499. Before Mrs. McGuire would return home with respondent, she made him write a promise to "treat Daisy good" and to be "a responsible husband." RT 361-362.

The defense focused on some difficulties between the McGuires. RT 528-530. Respondent also introduced testimony from neighbors about their observations on the day of the killing. RT 538-542, 551-552, 554-557. A babysitter who took care of Tori three or four times in April and May claimed that she never saw any bruises on the child. RT 563-564.

SUMMARY OF ARGUMENT

On July 7, 1981, Tori McGuire, the six-month old daughter of respondent, was beaten to death. She was covered with bruises and most of her internal organs were damaged. Respondent had sole custody of the child shortly before her death. He later asserted that Tori was

injured when she fell from a couch. As part of its case, the state presented expert testimony that Tori was a victim of battered child syndrome. The diagnosis was based, in part, on evidence of prior injuries, including partially healed broken ribs and a lacerated anus. Respondent was convicted of second degree murder and sentenced to state prison for fifteen years to life.

The state appellate court upheld admission of the battered child evidence based on well-established state law precedent. Relying solely on its own interpretation of state law and in partial reliance upon the Federal Rules of Evidence, the Ninth Circuit reversed respondent's murder conviction. It concluded that evidence of Tori's other injuries was inadmissible character evidence and that battered child syndrome testimony was irrelevant because respondent did not expressly raise an accident defense. The Ninth Circuit also found that a limiting instruction on the use of other crime evidence was improper and prejudicial. Both findings were premised on denial of a fundamentally fair trial under the Fourteenth Amendment.

The habeas corpus statute does not grant federal courts a roving commission to reinterpret state law or to reverse state criminal convictions simply because they disagree with the verdict. A federal habeas court is bound to accept the state's interpretation of its own law. An error of state law is ordinarily not cognizable on federal habeas corpus. Although the improper admission of evidence or an incorrect jury instruction might, in some

cases, result in the denial of due process, those situations are rare and narrowly drawn. This is not such a case.

Apart from its misunderstanding of state law, the Ninth Circuit completely misperceived the nature of battered child syndrome testimony. Its purpose is not to identify a particular person as the perpetrator, but to establish that the child's injuries were intentionally inflicted. The syndrome has found wide acceptance in all state and federal courts which have considered it, including the Ninth Circuit. The court's ruling threatens the use of battered child testimony and undercuts the ability of state courts effectively to prosecute and convict child abuse homicide cases.

This case graphically illustrates the need for further restrictions from this Court on the scope of federal habeas corpus jurisdiction. The tension created by excessive, appellate-style review of state courts by the lower federal courts undermines confidence in the criminal process and is inconsistent with this Court's recognition of state courts as fully committed to protecting the constitutional rights of criminal defendants. Moreover, it denigrates the prominence of the trial itself.

These problems are particularly acute where the petitioner claims that he was denied a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment. The lower federal courts widely disagree on the proper interpretation of fundamental fairness, in part because this Court has not articulated a test for assessing

whether a state criminal trial was fundamentally fair. The Court's habeas corpus jurisprudence has, however, recently emphasized the likely accuracy of a conviction in determining the scope of federal habeas review. Given those concerns, we submit that a defendant in a state criminal trial will not be denied fundamental fairness due to the admission of irrelevant, inflammatory evidence unless there is a reasonable probability that exclusion would have produced a more favorable result. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Even if the battered child evidence is excluded from this case, there is no reasonable probability that respondent would have obtained a different result. Because the outcome of his trial is reliable, respondent was not denied his right to fundamental fairness and due process.

ARGUMENT

I.
THE NINTH CIRCUIT EXCEEDED ITS HABEAS CORPUS JURISDICTION BY CONCLUDING THAT THE ADMISSION OF EVIDENCE AND USE OF A JURY INSTRUCTION DENIED RESPONDENT A FAIR TRIAL BASED ON ITS OWN INTERPRETATION OF STATE LAW.

The issue posed is whether federal courts reviewing habeas corpus petitions from state prisoners may employ the rubric of "fundamental fairness" to convert the Fourteenth Amendment into a code of evidence for state criminal trials. Although the question should answer itself, the opinion of the Ninth Circuit in this case demonstrates the need to further define and limit the reach of federal habeas corpus review of state convictions. In this argument we demonstrate why the Ninth Circuit erred by reversing respondent's second degree murder conviction. In Argument II, we suggest a test for determining when state law error has denied the defendant a fundamentally fair trial and due process.

A. The Limited Role Of Federal Habeas Corpus

"The role of federal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Because federal courts have no supervisory authority over state judicial proceedings, they

are limited solely to correcting wrongs of a constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The scope of habeas corpus review is thus limited by "interests of comity and finality." *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion). A state criminal conviction challenged on federal habeas corpus is presumptively final and legal. *Barefoot v. Estelle*, 463 U.S. at 887.

This Court has long recognized that a "mere error of state law" will not justify habeas corpus relief. *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *see also*, *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102 (1990); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Moreover, a federal court may not dispute or second-guess a state court's interpretation of its own law. *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 1447-1448 (1990); *Lewis v. Jeffers*, 110 S.Ct. at 3102. A petitioner who is unable to demonstrate that a specific constitutional right has been violated may nevertheless be entitled to relief if his trial was "so fundamentally unfair as to deny him due process." *Donnelly v. DeCristoforo*, 416 U.S. 637, 645 (1974). The Court has emphasized that the Due Process Clause has "limited operation," and that "fundamental fairness" is "very narrowly" drawn. *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668, 674 (1990). It has not, however, formulated a specific test for determining when the

fairness of a trial has been so compromised as to violate due process. We offer such a test in Argument II.

The opinion of the Ninth Circuit in this case demonstrates a fundamental misunderstanding of the limits which this Court has placed on federal habeas corpus jurisdiction. Not only did the court create it own version of state law, one completely at odds with the state courts' interpretation, it relied on the Federal Rules of Evidence to justify its holding. In addition, the court's discussion of battered child syndrome is inconsistent with every other court which has considered that condition, including another panel of the Ninth Circuit. Its holding could seriously affect state prosecutions of child abuse homicide such as this one. The Ninth Circuit's holding that a jury instruction was improper is also incorrect under state law.

B. The Ninth Circuit Erred In Holding That Evidence Of Prior Injuries Was Inadmissible To Support A Diagnosis Of Battered Child Syndrome

1. The Federal Court Misinterpreted State Law

The state trial court allowed the prosecutor to introduce expert testimony that Tori was a victim of battered child syndrome.[8/] Dr. Levine, who treated Tori

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8. The term "battered child syndrome" was created in Kempe et al., *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962). *See* McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L.Rev. 1, 4, n. 5 (1975).

in the emergency room, testified outside the presence of the jury that battered child diagnosis is a "routine part" of pediatric training. RT 17. Although physical injury which cannot be explained by the reported history is an important consideration, RT 19, no "single piece of evidence" is sufficient to establish the battered child syndrome. RT 22. After extensive argument, J.A. 1-20, the trial allowed Dr. Levine and Dr. Hermann, the pathologist, to give their opinions on whether Tori was a battered child. In support of their diagnosis, the witnesses could discuss the injuries sustained by the victim at the time of her death, the earlier damage to her ribs and anus, and the inconsistent explanation offered by respondent to the police. J.A. 17-20. The trial court excluded, however, any reference to sociological risk factors associated with battered children. J.A. 17.

In addition to testimony about battered child syndrome by the physicians, the prosecution introduced evidence of prior assaultive behavior against Mrs. McGuire by respondent, and statements by Mrs. McGuire to a neighbor that respondent had beaten her. RT 463-465, 467-469. The latter testimony was offered specifically to impeach Mrs. McGuire's testimony that respondent never hit her and that she was not afraid of him. RT 468. There was also testimony of two incidents when respondent manhandled his daughter. On one occasion he pinched her cheeks and forced food in her mouth while feeding the baby; later the same day her

face showed bruises where he had grabbed her. RT 469-470, 475-476. Another time respondent dragged the child by one arm to the car. RT 488-489. Tori was no more than five- to six-months old at the time of these incidents.

On state appeal, respondent argued that the prior injuries were improperly admitted because they were not specifically tied to him. The California Court of Appeal rejected this claim. It held that the prior injuries were admissible as tending to establish the battered child syndrome diagnosis. J.A. 45-47. In support of its conclusion the court relied upon three California cases, *Landeros v. Flood*, 17 Cal.3d 399, 131 Cal.Rptr. 69 (1976); *People v. Bledsoe*, 36 Cal.3d 236, 203 Cal.Rptr. 450 (1984); *People v. Jackson*, 18 Cal.App.3d 504, 95 Cal.Rptr. 919 (1971).[9/] It is clear from these decisions that battered child syndrome is a well accepted diagnosis in California courts and that evidence of prior injuries which tend to support the diagnosis is admissible. In *Jackson*, the "seminal case" on this subject, *State v. McKowen*, 447 N.W.2d 547, 549 (Iowa App. 1989), the court noted that a finding of battered child syndrome is simply a determination that the child's injuries were not inflicted by accident; it is not an opinion that any particular person "has done anything." 18 Cal.App.3d at 507, 95 Cal.Rptr. at 221. "The additional finding that the injuries were

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9. *Jackson* and *Landeros* were cited to and discussed by the state trial court during arguments on the admissibility of the battered child evidence. J.A. 7-9, 17-20.

probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason." *Id.*

The Ninth Circuit simply ignored the state appellate and trial court decisions in deciding that the prior injury evidence, specifically the broken ribs and lacerated anus, was inadmissible. The court first concluded, in partial reliance upon the Federal Rules of Evidence, that the other injuries were irrelevant and thus not probative because they were not specifically connected to respondent. 902 F.2d at 753. Despite evidence that respondent was "rough"[10/] with Tori in the past, the court found those acts were insufficient to permit the jury to infer that he also caused the rib and anal injuries. *Id.*, at 753-754. Again citing to the Federal Rules, the Ninth Circuit emphasized its view that the prior *injuries* were inadmissible as respondent's prior *bad acts*, in effect equating the actual injuries with the prior mistreatment. *Id.*, at 754.

Next, the Ninth Circuit concluded that the prior injuries were introduced "to establish that [respondent] was a child abuser, and for no other purpose, in a murder trial for the death of his child." *Id.* The injuries were

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10. The Ninth Circuit's description of respondent's behavior as "rough" is misleading. Respondent grabbed the baby's face while feeding her with sufficient force to leave bruises. Another time he picked up the infant and carried her to the car by one arm. Handling a five- or six-month old child like a sack of potatoes is more than "petty meanness." 902 F.2d at 753. It is brutal.

"incorrectly admitted . . . pursuant to California law" to prove battered child syndrome. According to the Ninth Circuit's understanding of state law -- an understanding at odds with the state courts -- such evidence is admissible solely to demonstrate that the present injuries did not occur accidentally and in this case "no claim was made that the child died accidentally." *Id.* The court cited *People v. Jackson*, 18 Cal.App.3d at 504, 95 Cal.Rptr. at 919 and *Landeros v. Flood*, 17 Cal.3d at 399, 131 Cal.Rptr. at 69, the same cases relied upon by the state courts, to support its conclusion about the scope of California law on battered child syndrome. Based on its own reformulation of the state trial record and of state law, the Ninth Circuit concluded that petitioner was prejudiced by admission of the prior injuries. *Id.* The court's holding is incorrect for a variety of reasons, all of which reflect a misunderstanding of, or disregard for, its habeas corpus jurisdiction.

In *Clemons v. Mississippi*, 110 S.Ct. at 1447-1448, this Court emphasized that a federal court has no authority to dispute a state court's interpretation of its own law. It made the point again in *Lewis v. Jeffers*, 110 S.Ct. at 3102-3103 (reversing Ninth Circuit's independent review of Arizona state law determination). *See also*, *Gryger v. Burke*, 334 U.S. at 731. The Ninth Circuit simply ignored these limitations.

Although California state law on the use of battered child syndrome has been settled for twenty years

and was specifically applied by the state courts in this case, the Ninth Circuit concluded that the evidence was "incorrectly admitted" under state law. 902 F.2d at 754. Incredibly, it did so by attaching its own meaning to the principal state cases with no discussion of the state appellate court's contrary holding. In light of *Clemons* and *Jeffers* the Ninth Circuit was bound by the state courts' conclusion that evidence of battered child syndrome, and use of the prior injuries to support it, was proper under state law.

2. The California Rule on Use of Battered Child Syndrome is Constitutional

In determining that the state court relied on an incorrect evidentiary theory, the Ninth Circuit cited to Rule 404(b) of the Federal Rules of Evidence. However, the rules are not constitutionally based. *Dowling v. United States*, 110 S.Ct. at 674. Thus a violation of those rules, or their principles, cannot alone constitute a federal constitutional violation since they only "govern the treatment of evidentiary questions in federal courts." *Bourjaily v. United States*, 483 U.S. 171, 177 (1987); *see*, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1160-1161 (7th Cir. 1987) (Ripple, J., concurring) (habeas corpus was properly denied, but court should not rely on the Federal Rules of Evidence when evaluating a challenge to a state court conviction). By citing to the rules and forwarding its own

view of state law, the Ninth Circuit attempts to impose over state courts a supervisory authority which it does not possess. *Smith v. Phillips*, 455 U.S. at 221.

As troubling as the court's reinterpretation of state law may be, the Ninth Circuit's woeful misunderstanding of battered child syndrome testimony may be the most pernicious and troubling aspect of its holding. The court concluded that battered child syndrome is admissible only if the defendant raises accident as a defense. Since the prior injuries were admitted solely to negate that defense, and were not specifically connected to respondent, and because respondent did not claim Tori's death was accidental, the Ninth Circuit held that the evidence was irrelevant and thus inadmissible. The court was wrong for several reasons.

"Child abuse is maddingly difficult to prove. . . . Often the only evidence is the bruised and battered body of a little child." Myers & Carter, *Proof of Physical Child Abuse*, 53 Mo. L.Rev. 189 (1988) [Myers]. Battered child syndrome is one method of bridging that evidentiary gap. "Unbeknownst to the perpetrator, abuse often leaves an indictment etched in human flesh." *Id.*, at 201.

Battered child syndrome is "a clinical condition in young children who have received serious physical abuse . . . ." Kempe et al, *The Battered-Child Syndrome*, 181 J.A.M.A. 17, 24 (1962) [Kempe]. It is a medical diagnosis based on an expert's observation of a child's

battered body. As such, the diagnosis does not depend upon evidence of the defendant's conduct toward the child, or on proof of the defendant's character. Myers, at 193. "A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome." Kempe, at 18. "[A] lame excuse cast[s] a shadow of suspicion over the defendant." Myers, at 223. The syndrome is not exclusive to any particular economic or social group. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L.Rev. 1, 16 (1965); Kempe, at 18.

"Battered child syndrome is well accepted by medical science . . . ." Myers, at 203. More importantly, it is well accepted by the courts. "[A]ll courts which have considered the question" have upheld the admissibility of battered child evidence. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905, 912 (1978).[11] *See, e.g., Bell v. State*, 435 So.2d 772, 776 (Ala.Crim.App. 1983); *State v. Mayer*, 151 Ariz.App. 253, 727 P.2d 31, 33 (1986); *State v. Dumlao*, 3 Conn.App. 607, 491 A.2d 404, 409 (1985); *State v. Tanner*, 675 P.2d 539, 543 (Utah 1983); *State v. Toennis*, 52 Wash.App. 176, 758 P.2d 539, 545 (1988).

Experts on battered child syndrome do not offer an opinion on whether any particular person committed

11. The majority of the cases dealing with battered child syndrome rely in part on the California Court of Appeal's decision in *People v. Jackson*, 18 Cal.App.3d at 504, 95 Cal.Rptr. at 919.

the crime, but testify solely on whether the victim's injuries could have been caused by accident. *See, e.g., State v. Mayer*, 727 P.2d at 33; *State v. Dumlao*, 491 A.2d at 410; *State v. McKowen*, 447 N.W.2d at 548-549; *State v. Wilkerson*, 247 S.E.2d at 911. Where the child is unable to testify, such expert testimony is "clearly relevant to the issue of the cause of the injuries." As such it is "highly probative" and any prejudice is outweighed by its probative value. *State v. Mayer*, 727 P.2d at 33; *see also, State v. McKowen*, 447 N.W.2d at 549 (battered child evidence is "highly relevant"); *People v. Barnard*, 93 Mich.App. 590, 286 N.W.2d 870, 871 (1979) (battered child syndrome is "highly relevant to the material issues of intent and nonaccident"); *State v. Tanner*, 675 P.2d at 543 (rejecting argument that prior injuries are more prejudicial than probative). That the victim, like Tori, has died, "strengthens, rather than diminishes, the law's concern for the special problems of prosecuting a defendant in a 'battered child' case." *Schleret v. State*, 311 N.W.2d 843, 844 (Minn. 1981). Evidence of other injuries introduced in support of the battered child diagnosis does not depend upon connecting the defendant to infliction of those injuries. The syndrome is "independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally, injured on the day in question." *Bludsworth v. State*, 98 Nev. 289, 646 P.2d 558, 559 (1982).

A diagnosis of battered child syndrome is often indicated when the "child's injuries do not jibe with the history given by the parents." *State v. Dumlao*, 491 A.2d at 409. Indeed, the discrepancies between the parent or caretaker's version of what happened and the nature of the injuries is crucial. Experts are generally allowed to explain why the proffered explanation is not reasonable. *See, e.g., Schleret v. State*, 311 N.W.2d at 845; *State v. Holland*, 346 N.W.2d 302, 307-308 (S.D. 1984); *State v. Tanner*, 675 P.2d at 544; *see also*, Myers, at 194, 222. "The expert opinion that the victim was a battered child, coupled with some additional proof, has been held sufficient to permit a jury to conclude that the child's injury occurred 'at the culpable hands of its parents.'" *Bludsworth v. State*, 646 P.2d at 559. Courts have held that the only additional proof necessary to support a conviction is the defendant's sole custody of the child. *See, e.g., State v. Dumlao*, 491 A.2d at 410; *People v. Henson*, 33 N.Y.2d 63, 349 N.Y.S.2d 657, 665-666 (1973). These cases are certainly consistent with this Court's recognition that pieces of evidence cannot be viewed in isolation. "The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. at 179-180.

Federal courts have allowed the admission of battered child syndrome and the evidence of other injuries and inconsistent explanation offered to support it. *United States v. Boise*, 916 F.2d 497 (9th Cir. 1990); *United States v. Leight*, 818 F.2d 1297 (7th Cir. 1987); *United States v. Bowers*, 660 F.2d 527, 529 (5th Cir. Unit B 1981) (battered child evidence coupled with proof of sole custody will support a conviction). Other courts have generally recognized the difficulty of proving child abuse cases and the need to rely upon evidence of prior injuries. *United States v. Harris*, 661 F.2d 138 (10th Cir. 1981); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973). The Due Process Clause of the Fourteenth Amendment "cannot possibly require more of a state court system" than is required of federal courts. *Smith v. Phillips*, 455 U.S. at 218. It is equally true that the federal courts cannot preclude state courts from using the same relevant and highly probative evidence which they allow in federal prosecutions.

The above cases demonstrate the flaws in the Ninth Circuit's analysis of respondent's trial. The battered child syndrome diagnosis was relevant to establish that Tori's death was not accidental. Her prior injuries, regardless of whether they were connected to respondent, and respondent's incredible claim that she was injured in a fall from the couch, whether or not he explicitly offered an accident defense at trial[12/], were admissible to support

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12. The Ninth Circuit's conclusion that accident was not a defense is misguided. Although defense counsel argued that Mrs. McGuire was the killer, she also contended that "[n]o matter who hit Tori, . . . [i]t was an involuntary manslaughter at most." RT 718. Because defense counsel reserved her opening statement, RT 12, the prosecutor did not know her theory of the case and could

the battered child diagnosis. The uncontradicted evidence that Tori was a battered child and the concession that she was in respondent's exclusive custody shortly before her death fully debunk the Ninth Circuit's view of the evidence as the "barest threads," 902 F.2d at 755, or "mere shadows of guilt." *Id.*, at 756. The state's case was, as the dissent from denial of rehearing en banc suggested, "very strong indeed," 919 F.2d at 583, if not overwhelming. Under the circumstances no basis appears for concluding that respondent's state court trial was so fundamentally unfair as to require a reversal based on denial of his due process rights. In the absence of a federal constitutional violation, the Ninth Circuit had no authority to reverse respondent's conviction.[13/]

Moreover, the Ninth Circuit's opinion could seriously undermine the ability of states to effectively prosecute child abusers and cases of child abuse murder. "Since 1985, the number of reported child abuse fatalities has increased over 38%." The National Center on Child Abuse Prevention Research, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual*

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only assume that it would be consistent with respondent's earlier statement. More importantly, he was not aware until Mrs. McGuire took the stand that she would accept blame for Tori's death.

13. The result in this case demonstrates how the doctrines of due process and fundamental fairness can be manipulated to reverse a state conviction with which the federal habeas court disagrees despite the absence of any specific federal constitutional violation. In Argument II we suggest a means for curbing such abuse.

Fifty State Survey, p. 15 (March 1990) [Current Trends]. In 1989, 1,237 child abuse fatalities were reported, a 3% increase over the previous year. *Id.*, at p. 14. Particularly disturbing is the age of these victims. In the fifteen states which provided data on age, over 50% were less than one at the time of death. *Id.*, at p. 16. Forty-eight children were murdered by a parent or caretaker in Los Angeles County in 1989. Los Angeles Times (November 14, 1990) at page 1A, column 2. In Chicago there were 41 child abuse homicides. Chicago Tribune (May 20, 1990) at page 1. New York reported 187 such fatalities. Current Trends, at p. 14.

Battered child syndrome was developed as a tool for identifying the victims of child abuse. The courts have recognized its reliability and probative value, when combined with other evidence, to convict the perpetrators of such offenses. "While the legal system cannot guarantee children a safe and nurturing environment in which to live and grow, the law helps stem the tide of abuse." Myers, at 225. The Ninth Circuit's threat to the continued use of battered child syndrome is without constitutional underpinnings and should be reversed.

C. **The Ninth Circuit Erred By Holding That A Jury Instruction Denied Respondent A Fundamentally Fair Trial.**

The jury in respondent's state trial was instructed on its limited consideration of other crimes evidence as follows:

> "Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
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> "1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
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> "2. To establish the battered child syndrome, and
>
> "3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

> "For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose." J.A. 40-41.

Lengthy discussions and arguments preceeded the trial court's decision to give the instruction. J.A. 21-39. Although respondent challenged the instruction in his direct appeal, the California Court of Appeal did not reach that issue. The District Court rejected a similar challenge in its order denying respondent's habeas corpus petition. J.A. 61-65.

The Ninth Circuit, focusing solely on subsection 3, concluded that the instruction denied respondent a fundamentally fair trial. Specifically, the court found that the instruction improperly "informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses." 902 F.2d at 755. It also concluded that the instruction was based on an "incorrect reading" of standardized state jury instructions. *Id.*, at 755, n. 2.[14/] Once again the Ninth Circuit ignored the limits of its habeas corpus jurisdiction.

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14. The fact that the state has changed its standardized instructions says nothing about the constitutional validity of the earlier version. The modified pattern instruction is an issue of state law outside the scope of the Ninth Circuit's habeas corpus authority.

This Court has strictly limited the authority of federal courts to reverse state criminal convictions based on the jury instructions. It is not enough to show that an instruction was "undesirable, erroneous, or even 'universally condemned.'" Rather, the question is whether the instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). That a particular instruction may be prohibited in federal prosecutions is not alone sufficient to establish that its use in a state prosecution violated the Due Process Clause of the Fourteenth Amendment. *Cupp*, at 146. More importantly, judges are not free in defining due process to impose "'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

The Ninth Circuit concluded that subdivision 3 of the instruction allowed the jury to use evidence of prior acts as improper character evidence. The significance of that section, however, can only be evaluated by comparison with the evidence in the case, the rest of that instruction, and the other instructions as a whole. *Henderson v. Kibbe*, 431 U.S. at 156. The Ninth Circuit did not undertake such an analysis.

Three types of "similar act" evidence were admitted at trial: (1) Tori's prior injuries (broken ribs and

torn anus); (2) physical assaults on respondent's wife; and (3) mistreatment of Tori by respondent (rough handling while feeding Tori and carrying her by one arm to the car). The prior injuries were specifically admissible to support the battered child syndrome diagnosis. The assaults on his wife impeached her testimony that respondent never hit Mrs. McGuire and that she was not afraid of him. The prior brutal treatment of respondent's infant daughter was admitted without objection or limitation. RT 469-471, 475-476, 488-489. During the conference on instructions the prosecutor argued, over defense counsel's objection, that respondent's handling of Tori should be considered as evidence of other acts tending to prove identity and intent. J.A. 23-24, 28-31. The trial court gave the instruction after reviewing the record for any limitations on the evidence demonstrating respondent's prior handling of the child. J.A. 31, 37-38. When the other acts instruction is viewed as a whole, in light of the other instructions and evidence in the case, there is no reasonable likelihood that the jurors misunderstood the limitations of the evidence or misapplied it. *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990). Even if the instruction was imprecise or allowed an improper inference to be drawn, it did not render the trial as a whole fundamentally unfair.[15]

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15. As noted by the judges who dissented from denial of en banc review, the jury deliberated three days and had several portions of the record reread, including a great deal of Mrs. McGuire's

Presumption instructions which implicate a defendant's right to be convicted only upon proof beyond a reasonable doubt, *see, e.g.*, *Rose v. Clark*, 478 U.S. 570 (1986), or instructions which incorrectly define an element of the offense, *see, e.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987), are properly subject to a harmless error analysis. Although the Ninth Circuit concluded that the instruction in this case violated due process and was not harmless beyond a reasonable doubt, citing *Chapman v. California*, 386 U.S. 18 (1967), that test was inappropriate. The instruction here dealt solely with the manner in which the jury could use certain evidence *under state law*. As such its validity cannot be separated from the admissibility of the evidence itself. Because, as discussed above, the evidence was properly admitted for the purposes described in the instruction, the instruction could have violated respondent's constitutional rights only if it rendered the trial fundamentally unfair. As set forth in more detail at Argument II, the test for fundamental fairness is less demanding than harmless error analysis under *Chapman*. It is certainly inappropriate to apply *both* fundamental fairness and harmless error analysis to the same claim.

The Ninth Circuit allowed its own interpretation of state law, misunderstanding of battered child syndrome, and dissatisfaction with respondent's conviction in light of

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testimony. "This jury was clearly not inflamed by passion." 919 F.2d at 584.

Daisy McGuire's immunity to override the limitations of its habeas corpus jurisdiction. Because his due process rights under the Fourteenth Amendment were not violated, respondent was not entitled to relief on federal habeas corpus.

II.
RESPONDENT RECEIVED A FUNDAMENTALLY FAIR TRIAL BECAUSE NO REASONABLE PROBABILITY EXISTS THAT EXCLUSION OF THE BATTERED CHILD EVIDENCE WOULD HAVE RESULTED IN A DIFFERENT VERDICT.

In *Sumner v. Mata*, 449 U.S. 539 (1981), this Court identified the question presented as "whether the Court of Appeals properly analyzed respondent's challenge to his state-court murder conviction, given the limited nature of the review provided federal courts by 28 U.S.C. § 2254." *Id.*, at 541; *see also, e.g., Demosthenes v. Baal*, ___ U.S. ___, 110 S.Ct. 2223 (1990); *Rushen v. Spain*, 464 U.S. 114 (1983); *Cupp v. Naughten*, 414 U.S. at 141. Ten years later the Court must again decide the appropriate scope of federal habeas corpus. We submit that the time has come to place a more specific limitation on a dual system of collateral review "that no other democracy deems necessary." Powell, *Capital Punishment*, 102 Harv. L.Rev. 1035, 1041 (1989) [Powell].

Establishing the boundaries of federal habeas corpus relief has engaged much of this Court's time and engendered countless scholarly discussions. The Court has not "always followed an unwavering line in its conclusions as to the availability" of habeas corpus relief. The law in this area "has been attended, seemingly, with some backing and filling." *Fay v. Noia*, 372 U.S. 391, 411-412 (1963). Various lines of authority have "not been without

historical uncertainties and changes of direction . . . ." *Wainwright v. Sykes*, 433 U.S. at 81. The Court has demonstrated, however, an "historic willingness to overturn or modify its earlier views of the scope of the writ . . . ." *Id.*

"Federal habeas corpus has been a source of friction between state and federal courts . . . ." *Sumner v. Mata*, 449 U.S. at 550. The resentment towards federal judges by state judges which habeas corpus review has created is "not healthy or wholesome," Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323, 327 (1971), nor is it theoretical. *See*, *People v. Miller*, 85 Cal.App.3d 194, 198-199, 149 Cal.Rptr. 204, 206 (1978) (characterizing district court order, based on recommendation of federal magistrate, to either recall remittitur and consider search issue or release defendant, as "an affront to the judges of the courts of this state"); *see also*, Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L.Rev. 423, 439 (1961) (acknowledging the author's negative feelings as New Jersey Supreme Court justice when convictions affirmed by the state court were reversed on federal habeas corpus).

This resentment is premised in part on the assumption of some who support expanded federal review that state courts are incapable of adequately protecting a criminal defendant's constitutional rights. *See, e.g.*, Neuborne, *The Myth of Parity*, 90 Harv. L.Rev. 1105

(1977) (contending that federal judging is superior to state judging in part because federal judges have better law clerks, federal judges exhibit "elan and a sense of mission," and federal judges come from a better socioeducational class); *Coleman v. McCormick*, 874 F.2d 1280, 1295 and n. 8 (9th Cir. 1989) (Reinhardt, J., concurring) (suggesting that state courts are unwilling or unable to vindicate federal rights). There is, however, no intrinsic reason for accepting the notion that federal courts are automatically more competent than state courts to fairly consider and resolve issues relating to federal constitutional rights. *See generally*, Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L.Rev. 441, 507-514 (1963) [Bator]. This Court has expressly rejected the notion that state judges lack "appropriate sensitivity to constitutional rights." *Stone v. Powell*, 428 U.S. 465, 493-494, n. 35 (1976); *see also*, *Swain v. Pressley*, 430 U.S. 372, 383 (1977) (noting "the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues . . . ."). More importantly, the Court has expressly recognized in cases such as *Clemons v. Mississippi*, 110 S.Ct. at 1441 and *Lewis v. Jeffers*, 110 S.Ct. at 3092, that state courts are better equipped than their federal counterparts to interpret and apply state rules of evidence and procedure. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990).[16] Extensive second-guessing of state court decisions by federal habeas courts can only diminish the sensitivity of state courts toward constitutional rights. McGowan, *The View from an Inferior Court*, 19 San Diego L.Rev. 659, 668-669 (1982). The objective of a bifurcated judicial system should be "to make both the federal and state court systems, strong, independent, and viable." O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 Wm. & Mary L.Rev. 801, 814 (1981).

Widespread and expansive use of federal habeas corpus also "degrades the prominence of the trial itself." *Engle v. Isaac*, 456 U.S. at 127. The view of the state trial as the "'main event,'" *Wainwright v. Sykes*, 433 U.S. at 90, is substantially diminished when a federal court on habeas corpus can reconsider and overrule all aspects of the state procedure including, as the Ninth Circuit did in this case, evidentiary rulings on issues of state law. This is particularly troublesome when the federal court can point to no specific constitutional violation, but must rely instead on its own notions of fundamental fairness and due process.

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16. In *Michelson v. United States*, 335 U.S. 469 (1948), Justice Frankfurter assumed that federal district court judges possess "a high standard of professional competence, good sense, fairness and courage . . . ." *Id.*, at 487-488 (Frankfurter, J., concurring). There is no reason to assume that state court judges lack these qualities.

A criminal defendant is denied due process by a trial court's "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). When attempting to define fundamental fairness, however, "constitutional line drawing . . . is necessarily imprecise." *Donnelly v. DeCristoforo*, 416 U.S. at 645. As a result, federal courts use a variety of formulations to describe the circumstances necessary to establish that the state trial was unfair. *See, e.g., Edwards v. Butler*, 882 F.2d 160, 164 (5th Cir. 1989) (state evidentiary ruling must be "sufficiently egregious" to render trial fundamentally unfair); *Dudley v. Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988) (erroneous ruling must be "'of such magnitude'" that result is denial of fundamental fairness); *Berrisford v. Wood*, 826 F.2d 747, 749 (8th Cir. 1987) (issue is whether error of state law was "so grossly or conspicuously prejudicial that it fatally infected the trial"); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (state procedure must be contrary to "general notions of fairness"); *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980) (use of evidence was "sufficiently unfair so as to raise the spectre of unconstitutionality"); *id.*, at 313 (errors "exceeded the tolerable level of ordinary trial error as to amount to a denial of constitutional due process"). In this case the Ninth Circuit simply decided that respondent's trial was "arbitrary and fundamentally unfair." 902 F.2d at 753.

Moreover, the federal courts often review state convictions using standards better suited to the supervision of federal trial courts than a test for constitutional error. *See, e.g., Hopkinson v. Shillinger*, 866 F.2d 1185, 1197 (10th Cir. 1989) (admission of other crimes evidence will be upheld unless probative value is greatly outweighed by prejudice); *Woodruff v. Lane*, 818 F.2d 1369, 1373 (7th Cir. 1987) (weighing probative and prejudicial value in deciding whether state evidentiary ruling was correct); *Dres v. Compoy*, 784 F.2d 996, 998 (9th Cir. 1986) (evidentiary rulings of state courts are reviewed for abuse of discretion [relying on cases involving direct review of a federal conviction]); *United States ex rel. Durso v. Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970) (holding that review of state court evidentiary rulings for abuse of discretion "must parallel" the test used on direct review of a federal trial court conviction). In effect, federal habeas corpus is converted from an extraordinary means of redressing an unjust incarceration, *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-258 (1973) (Powell, J., concurring), into a second or third appeal of the state conviction. *See, e.g., Dudley v. Duckworth*, 854 F.2d at 970-972 (Court of Appeals "reluctantly" disagreed with Indiana Supreme Court analysis of evidentiary issue based on state cases not cited in the state court's opinion); *Cooper v. Sowders*, 837 F.2d 284, 287-288 (6th Cir. 1988) (characterizing the Kentucky Supreme Court as the "lower court[]" and reversing in reliance on dissenting opinion in the state court). The

result is a substantial diminution in the state's "strong interest in preserving the finality of judgments," *Henderson v. Kibbe*, 431 U.S. at 154, n. 13; *see generally*, Bator at 444-453, and "hardly inspires confidence in our criminal justice system." Powell, at 1041.

A petition for writ of habeas corpus is not, as some have suggested, equivalent to an appeal of state court rulings to the inferior federal courts. *See*, *Anderson v. Butler*, 886 F.2d 111, 113 (5th Cir. 1989) (habeas corpus now functions "in a manner not wholly dissimilar from appeals to the inferior federal courts of state rulings on federal issues in state criminal cases"); Friedman, *A Tale of Two Habeas*, 73 Minn. L.Rev. 247 (1988). Nor should it be, for such an argument "is premised on a skepticism of state courts" which this Court has "decline[d] to endorse." *Sawyer v. Smith*, 110 S.Ct. at 2831. A petitioner who collaterally attacks his criminal conviction "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982); *Engle v. Isaac*, 456 U.S. at 135-136; *see also*, *Henderson v. Kibbe*, 431 U.S. at 154.

Although this Court has necessarily been imprecise in its definition of fundamental fairness, it has emphasized that alleged due process violations are not reviewed under a harmless error analysis. *Darden v. Wainwright*, 477 U.S. 168, 183, n. 15 (1986). Rather, the question of error subsumes the question of prejudice. If the defendant's trial was fundamentally unfair, he was

necessarily prejudiced and is thus entitled to a new trial. Similarly, even if errors occurred, if the trial as a whole was fair, the conviction should be affirmed. *See*, *United States v. Agurs*, 427 U.S. 97, 112-113 (1976). While the fundamental fairness inquiry under the Due Process Clause is less "demanding" than the harmless-error standard of *Chapman*, *Greer v. Miller*, 483 U.S. 756, 765, n. 7 (1987), the Court has yet to state a test for determining when due process has been violated. Recent decisions suggest an appropriate formulation.

The Court has emphasized that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, the Court's "cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague v. Lane*, 489 U.S. at 313 (plurality); *see, e.g.*, *Murray v. Carrier*, 477 U.S. 478 (1986) (a showing of factual innocence may allow review of an otherwise defaulted claim); *Strickland v. Washington*, 466 U.S. 668 (1984) (a defendant is prejudiced by ineffective counsel only if the attorney's actions undermine the reliability of the judgment); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (deportation of potential defense witnesses will not violate due process unless there is a reasonable likelihood that the witness could have affected the judgment of the trier of fact); *Manson v. Brathwaite*,

432 U.S. 98 (1977) (a suggestive identification procedure will not violate due process unless the identification is unreliable); *United States v. Agurs*, 427 U.S. at 112 (the materiality of evidence which prosecution should have disclosed must reflect the Court's "overriding concern with the justice of the finding of guilt").

Based upon its concern for the reliability of the trial, the Court developed a test for determining the materiality of evidence which should have been disclosed by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Such evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (Blackman, J.; White, J., concurring in part and concurring in the judgment); *accord*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). Because a claim of fundamental fairness is based upon the same concerns for the reliability and accuracy of the trial, the *Bagley* test should apply. Thus, a defendant in a state criminal trial is not denied fundamental fairness due to the admission of irrelevant, inflammatory evidence unless a reasonable probability appears that exclusion would have produced a more favorable result. *See*, *Moore v. Illinois*, 408 U.S. 786,

799-800 (1972).[17] When considered under this test, respondent's trial was fundamentally fair.

Even without evidence of the broken ribs and lacerated anus or the diagnosis of battered child syndrome, the medical evidence was overwhelming that Tori was intentionally killed and that she died very soon after the fatal injuries were inflicted. It is undisputed that respondent had exclusive custody shortly before she died. His explanation for her injuries, given to the nurse and his wife at the hospital and to the police on several occasions, was incredible; a sixteen-inch fall from a couch onto a carpeted floor could not have caused Tori's massive internal damage.

Respondent's confrontation with his wife in the hospital waiting room is particularly significant, although the Ninth Circuit gave it short shrift. After asking respondent several times what "really" happened and being given the same answer, Mrs. McGuire told respondent that he was "responsible" for the baby's condition. Respondent did not answer her. RT 179. Based on this

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17. The Court has declared that a state court's misapplication of state law does not violate the Fourteenth Amendment unless the misapplication is arbitrary or discriminatory. *Beck v. Washinton*, 309 U.S. 541, 554-555 (1969); *see also Engle v. Isaac*, 456 U.S. at 121, n.21. Since *Engle*, this Court's focus apparently has shifted from the arbitrariness of state judicial action to its impact upon the individual defendant. However, a state court that admits irrelevant and inflammatory evidence arguably acts in an arbitrary manner. In that sense, the approaches of *Beck v. Washington* and *Moore v. Illinois* are not entirely divergent.

testimony, the jury was properly instructed under state law that it could infer from respondent's failure to respond that Mrs. McGuire's accusation was true. RT 758-759. As the judges who dissented from rehearing en banc noted, "[t]his conversation makes no sense at all unless it was the father who abused the baby." 919 F.2d at 583. Moreover, it is impossible to conclude from this record that Daisy McGuire was sophisticated or clever enough to stage the conversation in order to later divert attention from her own guilt.

In addition, Mrs. McGuire's attempt to take the blame was inconsistent with the medical testimony and her own earlier statements and testimony. She and respondent were still living together and she discussed her testimony with respondent's attorney but refused to meet with the police or prosecutor. The jury was allowed to infer respondent's consciousness of guilt from this evidence, if it found that he had attempted to procure false or fabricated testimony from his wife. RT 752-753.

Evidence from Mrs. McGuire's statements to the police showed that Tori had been bruised on other occasions. She told the police that petitioner also took care of the infant and that he had no explanation when Mrs. McGuire asked him about the bruises. RT 371. When she asked whether her husband would hurt Tori, Mrs. McGuire replied, "I can't say . . . ." RT 372, 374.

In its first opinion the Ninth Circuit concluded, "Only the father and mother had access to the baby. One

or the other, or perhaps both, are responsible for the death." 873 F.2d at 1327; J.A. 82. Although the court executed a rhetorical retreat in its subsequent opinion, noting that "only the barest threads" connected respondent to the murder, 902 F.2d at 755, the simple fact is that only one of two people could have killed Tori. Given the evidence, confidence in the outcome is not undermined by admission of the battered child syndrome evidence or by use of the limiting instruction, even if it is assumed that both the evidence and the instruction violated state law. Because there is no reasonable probability of a different result, respondent was not deprived of his right to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment.[18]

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18. Unlike cases in which the Court has remanded for the purpose of undertaking a harmless error analysis, here we contend that no federal constitutional rights were violated. If the Court agrees, no further proceedings are necessary in the Ninth Circuit.

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

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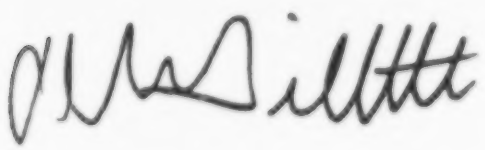

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